DOCKET FILE COPY ORIGINAL

Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
	)	
Procedures for Reviewing Requests for	)	WT Docket 97-192
Relief from State and Local Regulations	)	
Pursuant to Section 332(c)(7)(B)(v)	)	
of the Communications Act of 1934	)	

Reply Comments of AirTouch Communications, Inc.

Kathleen Q. Abernathy
David A. Gross

AirTouch Communications
1818 N Street, Suite 800
Washington, D.C. 20036
(202) 293-3800

Charles D. Cosson
AirTouch Communications
One California Street, 29th Fl.
San Francisco, CA 94111
(415) 658-2434

October 24, 1997

Summary

AirTouch supports the arguments of numerous commenters urging the Commission make clear that state and local government zoning decisions may not consider radiofrequency ("RF") emissions issues, or require carriers to supply any information about RF issues other than a certification of compliance with federal rules. AirTouch also supports the proposal that carriers be afforded a presumption of compliance with the Commission's RF guidelines. This approach would best implement Congressional intent, and represents the most effective and practical approach to regulating RF emissions.

As is evident from the title of Section 332(c)(7), Congress intended to preserve state and local jurisdiction to enact and enforce zoning regulations. Section 332(c)(7)(iv) makes clear that this jurisdiction does not, however, extend to enactment or enforcement of RF emissions guidelines. Rather, Congress directed the Commission to develop and enforce a national set of regulations for this purpose, consistent with the intent of the 1934 Communications Act to establish exclusively federal authority over "all the channels of radio transmission." As with other sections of the Communications Act, Congress has done the "heavy lifting."

Congress was not unaware of the public interest in protecting the health and safety of citizens. But Congress also established that jurisdictional boundaries must be respected where governments act to promote this interest. Just as the Commission may not determine whether a parcel of land sought to be used for a tower site is zoned for commercial use, state and local governments may not evaluate compliance with federal RF emissions standards.

The argument that because Congress only preempted state and local regulation "to the extent that" facilities are in compliance with federal RF emissions guidelines state and local governments may independently assess compliance with the federal guidelines is not persuasive. There is no residual state and local jurisdiction over RF emissions. The

Communications Act clearly establishes exclusive federal jurisdiction over technical issues of radio emissions, including "the external effects...from each station." Moreover, "to regulate" clearly means both the enactment and the enforcement of rules. State and local governments may not "regulate" by requiring carriers to conduct measurements, submit information, or submit to independent verification of compliance with federal RF emissions guidelines.

AirTouch also supports those comments who support establishing a presumption of compliance. Carriers have significant incentives to ensure rigorous adherence to federal standards, including the fact that carriers are responsible for compliance as a condition of licensing. These factors provide ample basis for establishing a presumption of compliance, and make state and local regulation of RF emissions unnecessary.

Also, the Commission's guidelines provide, in some cases, that certain facilities are so unlikely to create a potential for excess exposure that further scientific examination of their operations is unnecessary. Eliminating the costs of RF emissions measurements in those instances in which exposure is scientifically shown to be unlikely benefits carriers and consumers alike. Yet the Commission proposes to permit local governments to require carriers to submit information which would require carriers to conduct measurements for these facilities. The Commission should modify its proposed rules to provide that local governments may simply require a statement of compliance with FCC rules, not a statement of compliance with FCC RF emissions guidelines, for facilities covered by a categorical exemption in the Commission's rules.

In light of Congressional intent to restrict state and local regulation in this area, the Commission should make clear that it has sole jurisdiction to regulate RF emissions, and preempt any state or local RF emissions regulations, or land use or zoning decisions based on RF emissions concerns, where carriers attest to compliance with FCC standards.

Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
	)	
Procedures for Reviewing Requests for	)	WT Docket 97-192
Relief from State and Local Regulations	)	
Pursuant to Section 332(c)(7)(B)(v)	)	
of the Communications Act of 1934	)	

Reply Comments of AirTouch Communications, Inc.

AirTouch Communications, Inc. ("AirTouch") respectfully submits the following reply to the comments filed in the above-captioned proceedings.[1] AirTouch is a wireless communications company with interests in cellular, paging, personal communications services, satellite, and other operations.

INTRODUCTION

AirTouch supports the arguments of numerous commenters urging the Commission to adopt the first alternative approach proposed for implementing this section. That alternative would make clear that state and local government zoning decisions may not consider radiofrequency ("RF") emissions issues, nor require carriers to supply any information about RF issues other than a certification of compliance with federal RF standards. State and local jurisdiction over zoning would be preserved. Carriers would be afforded a presumption of compliance with the Commission's RF

[1]In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, WT Docket No. 97-197; Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-303 (August 25, 1997)("Notice"); see Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of CMRS Transmitting Facilities, RM-8577 ("CTIA Petition")

guidelines. This approach would best implement Congressional intent, and represents the most effective and practical approach to regulating RF emissions.

In amending Section 332, Congress intended to preserve, if not strengthen, federal authority in this area by expressly providing that the Commission should adopt national guidelines for RF emissions, and by expressly prohibiting state and local governments from regulating RF concerns. "Regulation," of course, means both the promulgation of rules, and their enforcement. In doing so, Congress intended to clarify that, in order to foster growth in telecommunications services, federal, state, and local governments should work cooperatively and respect jurisdictional boundaries. The first alternative proposed by the Notice best implements this intent.

Given the Commission's exclusive jurisdiction to both enact and enforce RF emissions guidelines, it has sole discretion to determine whether certain facilities should be categorically exempt from RF emissions monitoring, whether carriers should be afforded a presumption of compliance, and whether a certification procedure is sufficient to ensure enforcement. AirTouch supports these proposed enforcement mechanisms. Because CMRS carriers must both protect their customers and ensure compliance with license conditions, they have ample incentives to monitor their networks and ensure compliance with the Commission's RF guidelines. Under these circumstances, a presumption of compliance is justified. This approach also preserves the efficiency of the Commission's categorical exemption approach to antenna facilities either mounted too high or too low-powered to create a health hazard from RF emissions exposure.

I. The Commission Should Implement Congressional Intent to Preserve Jurisdictional Boundaries and Promote Wireless Communications

It is an axiomatic principle of law that governments may act only when authorized by a constitutional or statutory provision. Regardless of whether an action is thought to be desirable by citizens, regulators or both, that action must be authorized by law and within the jurisdiction of the governmental actor. The Commission should look skeptically

on comments that ignore this axiomatic principle. Neither public fears, political pressures, nor policy interests are a permissible basis for unauthorized government action, whether the issue is RF emissions or any other.

In this case, exclusive authority to act with respect to radiofrequency emissions is vested with the Commission. Section 301 of the Communications Act, enacted in 1934, provides that it is a purpose of this Act to maintain federal control over "all the channels of radio transmission."[2] Section 303 provides that, among other things, this control may be exercised by classifying radio stations, determine the power which each station shall use, and "regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein."[3] Several commenters support the view that Congress has vested exclusive authority in the Commission to regulate RF matters.[4]

In contrast, no provision of law provides for state or local authority to regulate radio frequency emissions. States do, however, retain the authority to regulate commerce within their borders, e.g., through land use regulations, and to delegate this authority to municipalities or other political entities within their borders. The 1996 amendments to the Communications Act clarify that this jurisdiction remains, but may not be used to encroach on federal authority over RF emissions. Section 332(c)(7) is entitled "Preservation of Local Zoning Authority."[5] This indicates that no expansion of zoning authority was intended. Similarly, the legislative history expressly provides that the Commission's exclusive authority over RF emissions is not contracted or otherwise affected.[6] Congress clearly intended to preserve existing jurisdictional boundaries.

---

[2]47 U.S.C. § 301

[3]47 U.S.C. §§ 303 (a), (c) and (e).

[4]See, e.g., Comments of PrimeCo Personal Communications, at 1; Comments of US WEST at 4, n.12.

[5]See 47 U.S.C. § 332(c)(7).

[6]H.R. Conf. Rep. 104-458, at 209.

A number of state and local governments believe, however, that because Section 332(c)(7)(iv) provides that no State or local government may regulate the placement, construction or modification of a wireless facility on the basis of RF emissions "to the extent that" a carrier is in compliance with FCC guidelines, Congress somehow intended that State and local governments could independently assess whether the carrier was in fact in compliance.[7] These commenters apparently believe that Congress intended to grant state and local governments residual authority to regulate RF emissions where a facility was not in compliance, making an independent assessment necessary to determine whether state and local jurisdiction exists.

These arguments are not persuasive. There is no residual state and local jurisdiction over radio transmissions.[8] As several commenters explain, the Conference Report explains that preservation of local land use authority does not limit or affect the Commission's general authority over radio telecommunications.[9] "To regulate" clearly means both the enactment and the enforcement of rules. State and local governments may not "regulate" by requiring carriers to conduct measurements, submit information, or submit to independent verification of compliance with federal RF emissions guidelines. Such regulation would necessarily interfere with the objective of a uniform national set of RF emissions standards, and with the Commission's discretion to determine how those rules should be enforced.

These commenters also argue that state and local governments must conduct such assessments in order to be able to answer to citizens whether a particular facility is in compliance, and that the Commission's discretionary decisions for enforcing the RF

---

[7]See, e.g., FCC Local and State Government Advisory Committee, Recommendation # 7, para. 2; Comments of "Concerned Communities and Organizations" ("CCO"), at 14.

[8]See, e.g., Comments of PrimeCo Personal Communications, L.P., at 4-6; Comments of CTIA at 9.

[9]Telecommunications Act of 1996, H.R. Conf. Rep. 104-458, at 209 ("Conference Report").

guidelines are either misguided or insufficient.[10] Even if this assessment of the Commission's procedures has merit, that does not confer authority for state and local governments to engage in unauthorized regulation activity.

Congress intended state, local, and federal authorities to work cooperatively. If state and local governments have an issue with whether a particular facility is in compliance with RF guidelines and feel that federal monitoring procedures are inadequate, they may not unilaterally initiate their own monitoring procedures on top of those prescribed by the Commission. In fact, in enacting a "de-regulatory approach" in the 1996 amendments, Congress has made it clear that it sought to avoid unnecessary or duplicative regulation of the telecommunications industry.[11] Under the law, the appropriate course of action is for those local governments to file a petition for rulemaking or otherwise seek changes in the Commission's exercise of its exclusive jurisdiction over RF transmissions.

It is unfair to suggest that this approach somehow shortchanges public health and safetyc in favor of corporate profiteering. AirTouch believes that, as public servants, the health and safety of citizens is as important to the Commission as it is to state and local governments. It is important to AirTouch as well. The fact that the public is concerned about health hazards from RF emissions is not lost on wireless carriers who also must answer to citizens, particularly those who are our customers, about RF emissions. Accordingly, AirTouch engineers design our networks to provide quality wireless connections within safe RF emissions parameters, and monitors for compliance with federal RF emissions guidelines where necessary.

---

[10]See, e.g., Comments of City and County of San Francisco at 5; Comments of National League of Cities/NATOA at 22-23.

[11]Conference Report at 1. Congress has also made it a national objective to eliminate unnecessary regulations which might deter CMRS carriers from providing services to consumers at more competitive prices, or from investing in new, more advanced technologies. See Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411(1994), para. 14-15.

Most importantly, Congress obviously is also concerned that the public be protected from harmful levels of RF emissions. But Congress did not provide, in the Communications Act or elsewhere, that this objective should be accomplished by state and local government enforcement of federal guidelines. Rather, Congress directed the Commission to adopt RF emission standards, and to adopt monitoring and compliance procedures to enforce those standards.[12] Given these Congressional decisions, the Commission should make clear that Section 332(c)(7)(iv) does not permit state and local governments to engage in regulatory enforcement of federal RF emissions standards.

II. The Commission Should Adopt A Presumption of Compliance and Protect the Integrity of Its Categorical Exclusion Approach

A. The Commission Should Adopt A Presumption of Compliance

The Notice tentatively concludes to adopt a rebuttable presumption that personal wireless facilities providers will comply with federal RF standards.[13] As the comments demonstrate, there are significant practical and policy reasons why a presumption of RF compliance is reasonable and best serves the public interest. CMRS carriers have ample incentives to ensure that their networks are safe and operating within federal RF emissions guidelines. Duplicative regulation by state and local governments is not necessary.[14]

A CMRS carriers entire business consists essentially of its license, its network, and its customers. Losing the license or the customer leaves the carrier holding the cost of the network. Because AirTouch cares about its customers, and because it must address the same public concerns about RF emissions to sell its products and services, AirTouch has a significant interest in ensuring that its operations are safe. Moreover, as some state and local governments recognize, CMRS carriers' licenses and license renewal are conditioned

---

[12]See Telecommunications Act of 1996, Section 704(b).

[13]Notice, para. 151.

[14]See, e.g., Comments of GTE at 11.

on compliance with RF emissions guidelines; carriers risk license revocation or non-renewal for failure to comply.[15] Additionally, there is the prospect of both monetary forfeitures assessed by the Commission, and the possibility of private causes of action, from either an individual or a local authority.

The argument that CMRS carriers must be closely monitored by state and local governments because providers may be tempted to "cut corners," knowingly disobey the Commission's regulations, or even attempt to evade enforcement measures is simply not valid.[16] Wireless carriers have ample incentives, not the least of which is their customers, to ensure compliance with RF emissions standards.

B. The Commission Should Preserve the Integrity of its Categorical Exclusion Of Facilities For Which Monitoring Is Unnecessary

The vast majority of antenna sites will be categorically exempt from the RF emissions guidelines due to either an antenna height over 10 meters above ground level or a broadcast power of less than 1,000 watts ERP.[17] The Commission's rules provide that these categorical exemptions are appropriate because even routine environmental evaluations are unnecessary, given the operating characteristics of these facilities. The Commission's actions in this docket should preserve the integrity of these categorical exemptions, not undermine them by requiring carriers to conduct such evaluations and provide local governments with either demonstrations or certifications of compliance.

As US WEST points out, each of the proposals the Commission is considering for "categorically excluded" facilities is inconsistent with the purpose of having a categorical

---

[15]See Comments of Orange County, Florida at 7 ("In regards to falsely certifying compliance with FCC RF emission guidelines, Orange County would defer to the FCC. Presumably such evidence would lead to the suspension or revocation of the applicant's license until the matter is rectified.")

[16]This argument is raised e.g., by the Comments of CCO at 15; Comments of National League of Cities/NATOA at 25.

[17]See 47 C.F.R. § 1.1307, Table 1.

exclusion.[18] The Commission proposes two options: 1) that local governments be permitted to require carriers to submit a "demonstration of compliance," or 2) that local governments may require CMRS providers to certify in writing that its proposed facility will comply with the RF emissions guidelines.[19] Either proposal requires CMRS providers to conduct emissions calculations or measurements of the facilities in question in order to comply with local government demands. Even where the carrier simply certifies in writing that it complies with the RF guidelines, it must perform measurements to verify that its certification will in fact be true.

AirTouch agrees with US WEST that effectively repealing the categorical exclusion would eliminate the cost savings it creates and poses a likelihood that state and local governments will engage in environmental regulation that both the Commission and other federal agencies have deemed unnecessary.[20] A better result would be to make clear that a self-certification of compliance may, as suggested by PrimeCo, simply be a certification that a carrier's facility meets the criteria necessary for the categorical exemption included in the Commission's rules.[21]

CONCLUSION

AirTouch concurs with those commenters who explain that state and local governments lack jurisdiction to regulate RF emissions from federally-licensed radio communications facilities. AirTouch also recommends that the Commission establish a presumption of compliance, and modify its proposals to preserve the integrity of its categorical exemption.

---

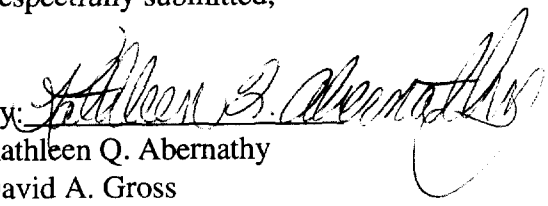
[18] See, e.g., Comments of US WEST at 10.

[19] See Notice, para. 143-144.

[20] Comments of US WEST at 14-15.

[21] Comments of PrimeCo Personal Communications, at 8.

Respectfully submitted,

By: 

Kathleen Q. Abernathy
David A. Gross

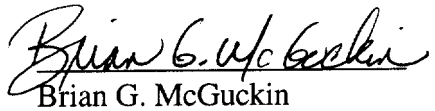
AirTouch Communications
1818 N Street, Suite 800
Washington, D.C. 20036
(202) 293-3800

Charles D. Cosson
AirTouch Communications
One California Street, 29th Fl.
San Francisco, CA 94111
(415) 658-2434

October 24, 1997

CERTIFICATE OF SERVICE

I, Brian McGuckin, hereby certify that a copy of the foregoing reply comments of AirTouch Communications, Inc. was sent by hand or by United States first-class mail, postage prepaid, on this the 24th day of October, 1997 to the parties on the attached list.



Brian G. McGuckin
October 24, 1997

Rosalind Allen
Federal Communications Commission
2025 M Street, NW Rm 5002
Washington, DC 20054

David Furth
Federal Communications Commission
2100 M Street, NW Suite 700
Washington, DC 20054

Stephen Markendorff
Federal Communications Commission
2100 M Street, NW Rm 8042B
Washington, DC 20054

William L. Roughton, Jr.
Associate General Counsel
PrimeCo Personal Communications, L.P.
601 - 13th Street, NW, Suite 320 South
Washington, DC 20005

Daniel Poole
Laurie Bennett
US West, Inc.
1020 19th Street, NW, Suite 700
Washington, DC 20036

Julia M. C. Friedlander
Deputy City Attorney
1390 Market Street
San Francisco, CA 94102

Tillman L. Lay
Miller, Canfield, Paddock and Stone, P.L.C.
1900 K Street, NW
Suite 1150
Washington, DC 20006

Wendy C. Chow
Michael Altschul
Randall S. Coleman
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, NW
Washington, DC 20036

Andre J. Lachance
GTE Service Corporation
1850 M Street, NW
Suite 1200
Washington, DC 20036

Paul H. Chipok
Assistant County Attorney
Orange County Attorney's Office
Orange County Administration Center
PO Box 1393
Orlando, FL 32802-1393

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE Suite 1800
Atlanta, GA 30309-2641

David G. Frolio
1133 21st Street, NW
Washington, DC 20036

Salvador Anzelmo, #2530
Michael W. Tifft, #17829
300 Poydras Street
Lykes Center - Suite 2100
New Orleans, LA 70130

Arthur Firstenberg
President, Cellular Phone Taskforce
PO Box 100404
Vanderveer Station
Brooklyn, NY 11210

Mark F. Hutchins
PO Box 6418
Brattleboro, VT 05302-6418

Diane E. Haavind
200 Columbia Heights Apt B
Brooklyn, NY 11201

Mrs. Dealy-Doe-Eyes Maddux
516 Shulenberg Road
Oppenheim, NY 13452

Darcie L. Nielsen
Commissioner, District 1
Board of Commissioners
San Juan County
350 Court Street
Friday Harbor, WA 98250

Katherine M. Harris
Stephen J. Rosen
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Mark J. Golden
Sheldon Moss
Personal Communications Industry Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Rhea Miller
Commissioner, District 3
Board of Commissioners
San Juan County
350 Court Street #1
Friday Harbor, WA 98250

Cathleen A Massey
Douglas I. Brandon
1150 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

David Fichtenberg
Ad-Hoc Assn
PO Box 7577
Olympia, WA 98507-7557

Dennis L. Myers
Ameritech Cellular Services
2000 West Ameritech Center Drive
Location 3H78
Hoffman Estates, IL 60195

John A. Prendergast
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, Suite 300
Washington, DC 20037

Elaine Reiss
Benjamin Lipschitz
DoITT
11 MetroTech Center, 3rd Floor
Brooklyn, NY 11201

Wilfredo Lopez
City of New York Department of Health
125 Worth Street, Room 607
New York, NY 10013

Kenneth S. Fellman
LSGAC
3773 Cherry Creek Drive North
Suite 900
Denver, CO 80209

Betsy Stover Granger
Carol L. Tacker
Glen A. Glass
James P. Tuthill
17330 Preston Road, Suite 100A
Dallas, TX 75252

John W. Pestle
Patrick A Miles, Jr.
Mark E. Nettleton
Varnum, Riddering, Schmidt & Howlett
Suite 1700
333 Bridge Street, NW
Grand Rapids, MI 49504